

In re Sherwood H.D. LLC., Case No. 04-31989
Appellate No. Dist. Ct. No. 94-1258-AA

10/22/04

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P04-3(7)

Fifty percent member of Oregon Limited Liability Company in dissolution filed chapter 11 bankruptcy petition on behalf of the LLC. The remaining 50% member of the LLC filed a motion to dismiss arguing that the filing member lacked authority to file on behalf of the LLC. The bankruptcy court agreed and dismissed the bankruptcy petition. It found that the filing of the petition converted the Debtor LLC into another type of entity and that, under Oregon law, such conversion required the approval of a majority of the members of the LLC.

The District Court, Judge Aiken, affirmed. The District Court citing ORS 63.130(4)(f), agreed that, under Oregon law, conversion of an LLC to another type of entity requires the approval of a majority of the members of the LLC. It also agreed, citing, citing Hillis Motors, Inc. V. Hawaii Automobile Dealer's Assoc., 997 F.2d 581 (9th Cir. 1993) and In re Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993) that "filing by an LLC in dissolution turns the Debtor into a 'different entity' for purposes of Or. Rev. Stat. 63.130(4)(f)."

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CLERK, U.S. BANKRUPTCY COURT
DISTRICT OF OREGON

OCT 22 2004

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PAID _____ BOCKETED _____

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON **BL04-31989-fmb/1**

In re:

ORDER

SHERWOOD H.D., LLC,

Civ. No. 04-1258-AA

Debtor-Appellant.

AIKEN, Judge:

The single issue before this court is whether the filing of a voluntary petition under Chapter 11 of Title 11 of the United States Code by the Debtor transforms the Debtor from a limited liability company into a different entity such that the filing of the voluntary petition requires the consent of a majority of the debtor members pursuant to Or. Rev. Stat. § 63.130(4)(f). I find such a transformation occurs and therefore, a majority consent is required. The Bankruptcy Court's April 27, 2004, Order granting Langer's motion to dismiss the bankruptcy filing is affirmed.

STATEMENT OF FACTS

Briefly, the Debtor is an Oregon limited liability company ("LLC") governed by Oregon law. Mr. Brenneke (Debtor-Appellant) is the "manager" of the corporation according to the Oregon Secretary of State's official records. Mr. Brenneke and Mr. Langer are each 50% members of the Debtor pursuant to the Order

1 - ORDER

Certified to be a true and correct
copy of original filed in my office.
Dated 12/2/04
Donald M. Cinnamon, Clerk
By CP Deputy

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1 and Decree entered on December 26, 2003, in Washington County
2 Circuit Court, and pursuant to an agreement placed on the record
3 in that same matter on October 21, 2003. The parties agree that
4 there is no Operating Agreement for the Debtor.

5 On March 9, 2004, Mr. Brenneke as a "member" of the Debtor
6 filed a Chapter 11 petition for the Debtor pursuant to the United
7 States Bankruptcy Code, Title 11. Mr. Langer did not and does
8 not consent to the filing of the Chapter 11 petition. By Order
9 entered on April 27, 2004, the Bankruptcy Court granted Langer's
10 Motion to Dismiss. On May 6, 2004, Debtor filed the appeal at
11 bar.

12 DISCUSSION

13 When considering whether the filing of a voluntary Chapter
14 11 petition by the Debtor transforms the Debtor from a LLC into
15 a different entity such that the filing requires the consent of
16 a majority of the Debtor members, the court looks first to the
17 plain language of Or. Rev. Stat. ¶ 63.130(4)(f). That statute
18 provides in relevant part:

19 Chapter 63 - Limited Liability Companies

20 Rights of members and managers; consent required

21

22 (4) Unless otherwise provided in the articles of
23 organization or any operating agreement, the
24 following matters of a member-managed or a
manager-managed limited liability company
require the consent of a majority of the members:

25

26 (f) The conversion of the limited liability company
27 into any other type of entity[.]

28 ORS 63.130(4)(f).

1 The parties agree that there is no operating agreement at
2 issue, and that the articles of organization do not contain any
3 specific language relevant to this issue, therefore I will assume
4 that if there has been a conversion of the LLC into "any other
5 type of entity," the consent of a majority of the members is
6 required. Since there are two members here, each owning 50% of
7 the Debtor, a majority consent requires the approval of both
8 members.

9 The Debtor-Appellant argues that the Debtor's filing of its
10 voluntary petition under Chapter 11 did not convert Debtor into
11 "any other type of entity." I disagree.

12 The Debtor-Appellant relies primarily on NLRB v. Bildisco &
13 Bildisco, 465 U.S. 513 (1984), for its argument that despite the
14 Chapter 11 filing, there was no conversion of the LLC into any
15 other type of entity. It is important to note, however, the
16 facts within which this issue arose. The Court in Bildisco was
17 deciding whether the National Labor Relations Board could find a
18 debtor-in-possession guilty of an unfair labor practice for
19 unilaterally rejecting or modifying a collective-bargaining
20 agreement before formal rejection by the Bankruptcy Court. Id.
21 at 527. Specifically, the Court was faced with the question of
22 whether certain provisions of the National Labor Relations Act
23 apply when a debtor-in-possession unilaterally breaches a
24 collective-bargaining agreement. The parties could not agree
25 whether the debtor was more properly characterized as an "alter
26 ego," or a "successor employer" of the pre-bankruptcy debtor, as
27 those terms have been used in the Supreme Court's labor
28 decisions. Id. at 528. The Supreme Court, after declining to

1 identify which, if either, of those terms represents the closest
2 analogy to the debtor-in-possession stated:

3 Obviously if the [debtor-in-possession] were
4 a wholly new entity, it would be unnecessary for the
5 Bankruptcy Code to allow it to reject executory
6 contracts, since it would not be bound by such contracts
7 in the first place. For our purposes, it is sensible
8 to view the debtor-in-possession as the same entity
9 which existed before the filing of the bankruptcy
10 petition, but empowered by virtue of the Bankruptcy
11 Code to deal with its contracts and property in a
12 manner it could not have done absent the bankruptcy
13 filing.

14 Id. at 528 (emphasis added).

15 The Court concluded that the debtor-in-possession was not
16 subject to the relevant labor laws because the Bankruptcy Code
17 rendered the collective-bargaining agreement unenforceable. Id.
18 at 532. I do not find, however, that Bildisco held that a
19 debtor-in-possession can not be held legally distinct from the
20 pre-bankruptcy corporation. Instead, I find that the Supreme
21 Court's holding is limited to the facts of the case - that is,
22 deciding whether the National Labor Relations Act applies when a
23 debtor-in-possession unilaterally breaches a collective-
24 bargaining agreement. Thus, the Ninth Circuit's
25 characterizations in Bonner Mall and Hillis Motors, both post-
26 Bildisco decisions, of debtor-in-possession as an entity that is
27 legally distinct from its pre-petition form are relevant and
28 persuasive. See Hillis Motors, Inc. v. Hawaii Automobile
Dealers' Assoc., 997 F.2d 581, 585 n.6 (9th Cir. 1993) ("[i]n the
majority of Chapter 11 cases, a trustee is not appointed but
rather the debtor's management maintains operation of the
business. In such cases the debtor is known as the debtor in
possession, which is a legally distinct entity"); and In re

1 Bonner Mall Partnership, 2 F.3d 899, 915 (9th Cir. 1993) ("the
2 very purpose of the Code's creation of the debtor-in-possession
3 was to increase the power of those in control of the debtor
4 during the reorganization process. Bankruptcy law is very
5 formalistic in that it treats the debtor, the debtor-in-
6 possession, and old equity as legally distinct entities when in
7 reality they may all be one and the same").

8 Moreover, the Ninth Circuit Bankruptcy Appellate Panel has
9 recently spoken on this issue. See In re Cheng, 308 B.R. 448
10 (BAP 9th Cir. 2004). There, the court noted that, "distinguishing
11 a debtor from a debtor in possession in bankruptcy litigation is
12 more than a matter of labels, but rather requires a nuanced focus
13 on what is at stake and how various interests are aligned or in
14 conflict." Id. at 4456 n.3. Cheng's point supports a finding
15 that a Chapter 11 filing by an LLC in dissolution turns the
16 Debtor into a 'different entity' for purposes of Or. Rev. Stat.
17 § 63.130(4)(f). The debtor-appellant's filing transforms an LLC
18 in dissolution to one no longer in dissolution; from an entity
19 bound by state law to liquidate its assets to one bound by the
20 Bankruptcy code to make a good faith effort to reorganize.

21 Finally, I rely on a decision recently issued by the
22 Bankruptcy court, In re Avalon Hotel Partners, LLC, 302 B.R. 377
23 (Bankr. D. Or. 2003). There, the court reviewed whether an
24 Oregon limited liability company's bankruptcy was properly
25 authorized. The court first noted that Oregon LLCs are governed
26 by the provisions of the Oregon Revised Statutes Chapter 63,
27 their Articles of Organization, and their Operating Agreements.
28 This case was commenced following the adoption of a resolution by

1 Avalon's manager authorizing the filing of a Chapter 11 petition,
2 without member approval. Pursuant to the Operating Agreement,
3 "Major Decisions" required the approval of members holding "in
4 excess of 75% of the Ownership Interests." Id. at 380. The
5 court held that pursuant to Or. Rev. Stat. § 63.130(4)(f), "a
6 decision to convert an LLC into any other type of entity requires
7 the consent of a majority of the members. By filing a chapter 11
8 petition, [Avalon] was converted into a debtor-in-possession,
9 charged with the fiduciary responsibilities of a trustee in
10 bankruptcy under Section 1107(a)." Id. 380-81. The court
11 concluded that the filing of the bankruptcy petition by Avalon's
12 manager without member approval was not authorized either by
13 Oregon law or the Operating Agreement, and therefore found that
14 under those circumstances, Avalon's motion to dismiss should be
15 granted. Id. Those are exactly the circumstances of the case at
16 bar. The Debtor-Appellant's filing under Chapter 11 was not
17 authorized either by Oregon law or by any Operating Agreement.
18 The Chapter 11 filing converted the LLC to another type of
19 entity, charging the debtor-in-possession with the fiduciary
20 responsibilities of a trustee in bankruptcy; so that whether the
21 Debtor-Appellant had the required majority consent of the members
22 became relevant. There is no dispute that it did not.

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IT IS SO ORDERED.


Ann Aiken
United States District Judge